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OF THE

United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,
vs.
JAMES DALE,
Respondent.

BRIEF OF AMICI CURIAE CALIFORNIA STATE CLUB ASSOCIATION AND NATIONAL CLUB ASSOCIATION IN SUPPORT OF THE POSITION OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PUBLIC POLICY BARRING DISCRIMINATION APPLIES ONLY TO PUBLIC, NOT TO PRIVATE LIFE	3
II. AFFIRMANCE OF THE DECISION BELOW WILL HAVE A CHILLING EFFECT UPON PRIVATE NON-COMMERCIAL ASSOCIATIONS AND CLUBS THROUGHOUT THE UNITED STATES AND WOULD LEAD TO THE EVISCERATION OF THE FIRST AMENDMENT PROTECTIONS FOR ALL SUCH ASSOCIATIONS AND CLUBS	8
A The Result-Oriented Legislative Definition And Judicial Construction of "Private" Club or Association to Mean "Place of Public Association" or "Business Establishment" are Constitutionally Flawed And Have a Chilling Effect Upon The Membership Selection and Activities of Private Non-Commercial Associations And Clubs	8
B Coerced Companionship And Forced Fraternization Dilute The Constitutionally Nurtured Freedom of Association And Ultimately Will Destroy The Diversity Among Free People That is Enriched by Private Associations and Clubs Safe From Government Regimentation	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Page

Bell v. Maryland, 378 U.S. 226 (1964) 4

Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 4

Bohemian Club v. Fair Employment and Housing Commission, (1986) 187 Cal. App. 3d 1 11

Civil Rights Cases, 109 U.S. 3 (1883) 4

Curran v. Mount Diablo Council of the Boy Scouts, 17 Cal 4th 670 (1998) ..... *passim*

Edward v. South Carolina, 372 U.S. 229 (1963) 16

Evans v. Newton, 382 U.S. 296 (1966) 4

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) ...4

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston 515 U.S. 557 (1995) 6, 14, 16

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 4

Nat. Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) 15

National Endowment for Arts v. Finley, 524 U.S. 569 (1998) 15, 16

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 8

Olmstead v. United States, 277 U.S. 438 (1928) 7

Pacific-Union Club v. Superior Court (State Franchise Tax Board), 232 Cal.App.3d 60 (1991) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 3, 5, 6

TABLE OF AUTHORITIES

CASES

Page

United States v. Virginia, 518 U.S. 515 (1996) 10

Warfield v. Peninsula Golf & Country Club, 10 Cal 4th 594 (1995) 9

Statutes

Cal. Civil Code §§ 51, 52, 52.2 10

Cal. Penal Code § 422.9 10

Conn. Gen. Stat. § 52-571d(a) 9, 10

Kan. Stat. Ann. §§ 44-1002(h) (West 2000) 9, 10

Kan. Stat. Ann. § 36-501 (West 2000) 9, 10

Mich. Comp. Laws Ann. §§ 37.2301, 37.2303 .....9, 10

Nev. Rev. Stat. § 651.050 (West 2000) 9, 10

Other Authorities

Associations in a Nutshell, Nov. 30, 1999, American Society of Association Executives 6

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TABLE OF AUTHORITIES

Page

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Rosenblum, Nancy L., *Membership and Morals: The Personal Uses of Pluralism in America* (1998) 5, 7

Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations (1991) 104 Harv.L.Rev. 835 ..... 8, 12

The Encyclopedia of Associations (33rd ed.) Volume 1 6

INTEREST OF AMICI CURIAE[1]

The California State Club Association ("CSCA") is a California non-profit, mutual benefit corporation. Its membership includes more than 100 private voluntary, non-profit clubs in California that were formed and are operated for recreational and private social purposes. Membership in the clubs is based upon a goal of furthering and preserving conviviality, congeniality and common interests of the individual members. Use of the clubs and their facilities is typically reserved to club members and their accompanied guests.

CSCA's purpose and activities have been and are to monitor judicial decisions of interest to its members, to inform its members of those developments through publications and seminars, and to speak for its members before the state legislature and the courts. CSCA asserts the right of voluntary private clubs and their individual members to enjoy and practice the freedoms of association and assembly guaranteed by the Constitution.

The National Club Association ("NCA") is an association of over 1,000 private clubs which have approximately 1 million individual members. NCA performs at the national level essentially the same functions as CSCA performs in California.

Amici do not advocate or endorse discrimination. Amici's interest in this case arise from their concern that a decision holding a *bona fide* voluntary non-commercial private organization, such as the Boy Scouts, subject to the New

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[1] Pursuant to Rule 37, written consent of counsel of record for all of the parties in this case has been lodged with the Clerk of the Court. No party or parties' counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

Jersey law could have a serious and irreparable prejudicial impact on private clubs and associations throughout the United States. It would send a signal to other states' courts, legislators, and government officials to follow the lead of the New Jersey court in construing similar public accommodation anti-discrimination laws to infringe upon constitutional provisions protecting freedom of association. Amici urge this Court to reverse the judgment below and to make clear that public accommodation anti-discrimination laws may not be constitutionally applied to private voluntary social clubs and associations that are predominantly non-commercial regardless of whether those clubs and associations are expressive or are sending any message.

SUMMARY OF ARGUMENT

Public accommodation anti-discrimination laws cannot be enacted or construed to apply to private voluntary non-commercial associations and clubs because they would intrude upon the constitutionally protected right of association. There are thousands of clubs in the United States, many of which are members of amici, that are private, voluntary and non-commercial with genuinely selective membership, purely social purposes and policies prohibiting commercial or business activities. If this Court sustains the New Jersey Supreme Court decision stretching its "public accommodation" law to include the Boy Scouts, there are few private clubs that would not be exposed to claims based on governmental compelled access laws. Such claims would have a chilling effect upon First Amendment rights, including membership policies, selection of leaders, and typical club activities. They would result in burdensome, expensive and oppressive litigation. The near universal impact of these compelled access laws and claims based on them will inevitably change the composition and quality of life in

private associations and clubs, and the values they help to preserve.

Government intrusion mandating membership and leader selection within private clubs and associations against the shared views and ideals of members of even non-expressive associations would alter and transform those associations, and ultimately undermine and diminish diversity with its universally accepted value to our pluralistic society. It will inevitably raise issues of political intrusion into private associations and present the always lurking danger of the politically correct dogma invading the cloister of private friendships, collegial association, and social discourse. Rather than promoting the goal of greater diversity among free peoples gathering together, congeniality and individuality will be sacrificed under the banner of bias eradication for a sterile collection of governmentally approved homogenous and fungible groups.

ARGUMENT

I.

PUBLIC POLICY BARRING DISCRIMINATION APPLIES ONLY TO PUBLIC, NOT TO PRIVATE LIFE.

New Jersey, like California and all other states, has a deep and continuing interest in "ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts v. United States Jaycees,* 468 U.S. 609, 632 (1984) (O'Connor and Kennedy JJ., concurring). That interest does not extend to private voluntary associations of a non-commercial nature. Discrimination in public and other commercial places is banned, but in our homes, our clubs and other private associations, we are free to choose our associates and companions.

The wall between the ban on discrimination in public arenas and the freedom to choose one's associates in private associations was erected early in the first civil rights era, and has long been recognized by this Court. "In the debates that culminated in the acceptance of the Fourteenth Amendment, the theme of granting 'civil,' as distinguished from 'social,' rights constantly recurred." *Bell v. Maryland* 378 U.S. 226, 294 (1964) (Goldberg, Warren, C.J., and Douglas, JJ. concurring). (Footnote omitted.)

Recognizing its constitutional significance, this Court has insisted upon the clear distinction between legally protected equality of civil rights and unregulated personal choice of social rights. *See Civil Rights Cases,* 109 U.S. 3, 48, 59 (1883) (Harlan, J., dissenting); *Bell v. Maryland,* 378 U.S. 226, 294, 313 (1964). *Accord, Evans v. Newton,* 382 U.S. 296, 298-299 (1966); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting); *Gilmore v. City of Montgomery,* 417 U.S. 556, 575 (1974) (adopting referenced portion of Douglas, J. dissent); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 547 note 6 (1987). "One central theme emerges from the talk of 'social equality': there are two kinds of relations of men, those that are controlled by the law and those that are controlled by purely personal choice. The former involves civil rights, the latter social rights." *Bell v. Maryland, supra,* 378 U.S. at 294 note 14 (Goldberg, J., concurring) (*quoting* Frank & Munro, *The Original Understanding of "Equal Protection of the Law"* (1950) 50 Col. L. Rev. 131, 148-149).

This distinction between civil and social rights is comparable and sets the same limits to anti-discrimination laws and a state's interest in enforcing those laws. "[T]he Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights." *Bell v. Maryland,*

supra, 378 U.S. at 313. Justice Goldberg's opinion emphasized that "the constitutional right of every person to close his home or club to any person" are social rights, which like other "rights pertaining to privacy and private association are themselves constitutionally protected liberties." *Id.*

The freedom to choose one's associates, to form private groups, associations and clubs, and to select leaders for those groups, serve important values. Because "individuals draw much of their emotional enrichment from close ties with others," freedom of association "safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts v. United States Jaycees, supra,* 468 U.S. at 619. The freedom of association is integral to being a free person. Freedom to choose one's own companions, colleagues, associates or friends is what being free means.

Private associations and clubs are fundamental building blocks of pluralism and social diversity, a bulwark against the power of the state. *See Roberts v. United States Jaycees, supra,* 468 U.S. at 619 (1984); Alexis de Tocqueville, *Democracy in America,* Vol. 1, 196 (Henry Reeve, trans., Rev. Ed. 1900); C. & M. Beard, *The Rise of American Civilization* Vol. 2, 730-731 (1927) (referring to de Tocqueville and the "tendency of Americans to unite with their fellows for various purposes"). In our increasingly fragmented, mobile and impersonal world, private groups and associations provide a critical sense of belonging, a fellowship and a comfortable environment for social interaction and the pursuit of happiness. Amy Gutmann, *Freedom of Association: An Introductory Essay,* in *Freedom of Association* 3-4 (Gutmann, ed., 1998); Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in*

America 3, 18, 25-26 (1998).[2] Freedom to select leaders and members is essential to the continued vitality and diversity of voluntary private associations and clubs.

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire .... Freedom of association therefore plainly presupposes a freedom not to associate. (Citation omitted.)

Roberts v. United States Jaycees, supra, 468 U.S. at 623. *Accord, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 581 (1995) (a private club may exclude anyone "whose manifest views were at odds with a position taken by the club's existing members").

Just as the Boy Scouts provide emotional enrichment, discipline, fun and identity formation for the young men in

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[2]What was true in de Tocqueville's time is equally true now. There are tens of thousands of private associations and clubs in the United States. *The Encyclopedia of Associations* (33rd ed.) Volume 1 identifies 23,000 national associations, including over 600 fraternal, nationality and ethnic organizations, over 2000 cultural organizations, over 100 social fraternities and sororities, and over 2300 hobby and avocational groups. The Encyclopedia also reports over 110,000 local, state, and regional associations. *Associations in a Nutshell,* Nov. 30, 1999, American Society of Association Executives, http://www.asaenet.org/research/fa. There are over 1000 fraternal, foreign interest, nationality and ethnic associations headquartered in California. NCA membership of over 1000 private clubs represents an estimated 20% of the total universe of 5000 private clubs. There are well over 5 million individual members in the private club community alone and several more millions if nationality, ethnic and cultural organizations and clubs are included. The San Francisco Chamber of Commerce lists over 800 groups in *Bay Area Clubs, Organizations & Associations, A Guide to Getting Involved* (April 1, 1999), including categories from Animals and Arts to Women and Youth. The great variety and distinctiveness of clubs and associations necessarily foster diversity and its accepted values.

Scouting, social clubs provide conviviality, a sense of belonging, a sharing of interests, and pleasure and relaxation for their members. These benefits flow from voluntary associations. They do not blossom in forced association with others one would rather avoid.

> People find in association a value itself. The point is obvious, but it has not received enough judicial attention or protection .... [T]he web of relations housed in an association can take on a tremendous value, greater than the goals of the association.

George Kateb, *The Value of Association,* in *Freedom of Association,* 37 (Gutmann, ed. 1998). *See also,* Bloustein, *Group Privacy: The Right to Huddle* (1977) 8 Rutgers-Camden L. J. 219, 278-279; Nancy L. Rosenblum, *Membership & Morals, supra,* 30. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness .... [They] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone ..." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). That right would be diminished and adulterated by the affirmance of the decision below.

II.

AFFIRMANCE OF THE DECISION BELOW WILL HAVE A CHILLING EFFECT UPON PRIVATE NON-COMMERCIAL ASSOCIATIONS AND CLUBS THROUGHOUT THE UNITED STATES AND WOULD LEAD TO THE EVISCERATION OF THE FIRST AMENDMENT PROTECTIONS FOR ALL SUCH ASSOCIATIONS AND CLUBS.

A The Result-Oriented Legislative Definition And Judicial Construction of "Private" Club or Association to Mean "Place of Public Association" or "Business Establishment" are Constitutionally Flawed And Have a Chilling Effect Upon The Membership Selection and Activities of Private Non-Commercial Associations And Clubs.

In 1988, this Court sustained against facial attack a local anti-discriminatory law targeting non-private organizations which were "commercial" and "where business deals are often made." *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 12 (1988). Since then there has been ever increasing governmental intrusion into the membership and activities of *bona fide* voluntary private associations with scant or no attention to a fundamental premise of that decision, namely, the requirement as a matter of constitutional law that they be "sufficiently 'public' in nature" to be regulated. *Id.* at 5; *see also id.* at 12, 18 (referring to the "critical respect of whether business activity is prevalent"); *Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations* (1991) 104 Harv.L.Rev. 1835.

Thus, for example, Michigan's Civil Rights Act defines a "place of public accommodation" to include the facilities of

each "private club" which is a "country club or golf club," a "boating or yachting club," a "sports or athletic club," or a non-religious "dining club." Such clubs are expressly excluded from the Act's private club exemption. Mich. Comp. Laws Ann. §§ 37.2301 and 37.2303. Connecticut's equal access law covers a "golf country club" which is defined as any association of twenty or more persons which maintains a golf course of nine holes or more that accepts payments, "directly or indirectly, from or on behalf of non members." Conn. Gen. Stat. §52-571d(a). Nevada's equal access law exempts private clubs yet includes any facility "where food or spirituous or malt liquors are sold", "any place of "exhibition or entertainment", any "service" establishment, any place of "exercise or recreation", and any establishment which serves patrons of such described establishments. Nev. Rev. Stat. § 651.050 (West 2000). The Kansas anti-discrimination statute expressly incorporates "private clubs" within food service establishments, which comprise public accommodations, yet exempts religious, nonprofit fraternal, or social associations smaller than 100 members. Kan. Stat. Ann. §§ 44-1002(h) and 36-501 (West 2000). And in California a private association or club that permits a member to sponsor a non-member's bar mitzvah or allows gratuitous use by non-members of its facilities is exposed to becoming a "business establishment" making it subject to the state's anti-discrimination law. *Warfield v. Peninsula Golf & Country Club,* 10 Cal 4th 594 (1995); Cal. Civil Code § 50.[3] In his concurring opinion, Justice Mosk empha-

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[3]The California Supreme Court held as a matter of law that any revenue from a non-member of a private non-profit country club was a "business transaction" regardless of the character of the "transaction"' (*e.g.*, a member "sponsored" fashion show or wedding reception attended by non-members) or its quality (*e.g.*, the local high school team using the golf facility) or the relationship of the non-member (*e.g.*, non-member employees using club facilities when the club was closed) or whether such "business transactions" provided a net financial benefit.

sized the "vast array of voluntary associations, nonprofit organizations, and charitable groups" potentially subject to California law and presciently cautioned against "interpretation" based "on the personal views of individual judges regarding a preferred composition of a private noncommercial organization." *Id.* at 632. *See also, United States v. Virginia,* (1996) 518 U.S. 515, 601 (Scalia, J., dissenting) (critically referring to Supreme Court dispositions based on the Court's "Members' personal view of what would make a 'more perfect Union' " in the admission policy of Virginia Military Institute).

Violations of such state and local laws may result in substantial and serious exposure to multiple damages, penalties and fines (e.g., California: three times actual damages but no less than $1,000 for "each and every offense," attorney's fees, and criminal sanctions, including possible imprisonment (Cal. Civ. Code § 52, 52.1; Cal. Penal Code § 422.9); Michigan: injunction, damages, punitive damages, costs and attorney's fees (Mich. Comp. Laws Ann. §§ 37.2801, 37.2802); Connecticut: actual damages but no less than $250, statutory civil and attorneys' fees (Conn. Gen. Stat. § 52-571(g)); Nevada: injunction, damages, costs and attorneys' fees (Nev. Rev. Stat. § 651.050); and Kansas: damages for pain and suffering (Kans. Stat. Ann. § 44-1002). Private associations, and their officers and directors, are constantly in peril of application of these laws. If the Boy Scouts — an archetypical voluntary association not

Id. at 599-601, 621-623. The Court ruled that any club becomes a "business establishment" if such non-member "business transactions" were "regular and repeated" (which "business transactions" were less in aggregate than 5% of the Club's total revenues in this case.) *Id.* at 602 note 3. As the dissenting Chief Justice points out, this ruling provides no "principled basis" to determine when a private club is transformed into a "business establishment." *Id.* at 640 (Lucas, C.J.). *See also, Curran v. Mount Diablo Council of the Boy Scouts* ("Curran"); 17 Cal 4th 670, 721-722, 732-733, 733-734 (1998).

resembling a Rotary chapter in any meaningful way (Appendix 482 - 502) — is a "place of public accommodation," there are few private clubs that would not be subject to claims based on government compelled membership requirements.[4] Notwithstanding the New Jersey statutory command not to construe the law to apply to "distinctly private" *bona fide* clubs or places of accommodation, private non-commercial life will have been constitutionalized for government regulation if Respondent prevails. Professor George Kateb makes this exact point:

> If a private social club cannot be free of governmental interference, . . . [t]he right of association is left in a precarious state: if social clubs can be regulated invasively, almost any kind of association can be; and the regulation can proceed with less reluctance.

George Kateb, *The Value of Association, in Freedom of Association, supra,* at 41.

Clubs and associations will be required to vet each proposed club activity to make certain it has no non-member element. Caution will dictate that the club monitor all activities and events, ask each member the identity and position of each guest, and inventory that information for possible government review. Private clubs and associations, on pain of compelled membership of statutorily preferred classes, will become more parochial; charitable, community and other non-member usage will be discouraged or prohibited; and the value to pluralism of many private social,

[4] Neither do the number of troop members nor the attendance of non-members at certain troop meetings demonstrate a lack of that private, intimate atmosphere deserving constitutional protection. In *Bohemian Club v. Fair Employment and Housing Commission* (1986) 187 Cal. App. 3d 1, *appeal dismissed,* (1987) 484 U.S. 805 for example, the court noted that in a 2,000-member men's club "the consequent relationship among members is undoubtedly 'intimate' in associational terms" (187 Cal.App.3d at 13).

recreational, cultural and ethnic organizations and clubs will be diminished or lost. "[G]overnment control over membership policies [of private social clubs] may destroy or irreversibly alter the character of the organization." *Note, supra,* 104 Harv.L.Rev. at 1839. The pervasive impact of laws such as those of New Jersey, California, and others like them, necessarily has a chilling effect on the membership policies and day-to-day activities of even the most private of associations and clubs. *See* Nancy L. Rosenblum, *Compelled Association,* in *Freedom of Association, supra,* 87 ("Once the justification for compelled association is loosed from its tether to public accommodation law and the aim of 'clearing the channels of commerce,' there is nothing to stop the argument to cover every arbitrary and unjustified subordination and exclusion").

B Coerced Companionship And Forced Fraternization Dilute The Constitutionally Nurtured Freedom of Association And Ultimately Will Destroy The Diversity Among Free People That is Enriched by Private Associations and Clubs Safe From Government Regimentation.

Curran, 17 Cal. 4th 670 (1998), the California Supreme Court decision holding the Boy Scouts not to be a "business establishment," is correct and the decision below holding the Boy Scouts to be a "place of public accommodation" is erroneous, but the opinions of both courts are fundamentally flawed. While both opinions engage in complicated "interpretation" and "construction" of the coverage definition citing and referring to dozens of decisions, even a superficial analysis shows that each "merely purports to apply the phrase 'business establishment' in [California Civil Code] section 51 [or "place of public accommodation" in N.J.S.A. 10:5-5] to the peculiar facts presented, and then asserts that its words are broad enough to reach the entity in question." *Id. at* 722 (Mosk, J., concurring). This result orientation

"fail[s] to give guidance for lawful conduct outside of court or for principled decision making within" the court. *Id.*

More importantly, this *ad hoc* approach diverts from the fundamental inquiry with its proper focus on the importance of the constitutional freedoms of private voluntary associations of a non-commercial nature. In California, as in New Jersey and other jurisdictions, "[t]his vice [developing discrimination rules on an *ad hoc* basis] did not become pernicious until recently because the results [of earlier decisions] appeared consistent with the legislative intent to prohibit discrimination by those engaged in commercial activity regardless of its form" *Curran, supra,* 17 Cal. 4th at 733 (Brown, J., concurring). This "pernicious" vice has brought California and, we submit, New Jersey and some other states, to the point where there is an absence of "useful guidance" in determining coverage or "predictability" in applying nondiscrimination laws. In joining in the judgment that the Boy Scouts were not a "business establishment," all four concurring Justices in the California Supreme Court recognized the ambiguity of that term and its erroneous application to the Boy Scouts. *Id.* at 703, *et seq.,* (Mosk, J.), 722, 728 (Kennard, J.), 730, 732-733 (Werdegar, J.), 733-734 (Brown, J.). "[T]he law is a mess . . . [and] now desperately in need of critical reexamination." *Id.* at 733. As this Court has properly focused in the constitutional context on discrimination in public entities and commercial opportunities and activities, the opinions of two of the concurring Justices in *Curran* expressly recognized that "principled" decisionmaking limits the anti-discrimination law to commercial settings — activities involving the providing of goods and services for a price in the course of a non-continuous, non-personal and non-social dealing and not relationships of a gratuitous, continuous,

personal and social nature. *Id.* at 720 (Mosk, J.), 734 (Brown, J.); see also 731 (Werdegar, J.).[5]

The goal of some states since the New York State Club Association decision has not been "ensuring nondiscriminatory access to commercial opportunities in our society;" instead — apparently based on a determination to cleanse all society of improper bias — their purpose appears to be coerced social relations within all associations and clubs as to certain approved classes. Such coercion is constitutionally permissible when public places or commercial associations are involved, but it is essential that this Court not authorize that coercion of voluntary private non-commercial associations. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995) (the goal of ridding society of discrimination against certain classes "is a decidedly fatal objective"). Regardless of any message, private non-expressive associations are entitled to constitutional protection. There is "no authority for the premise that intimate associations are relegated to the basement of First Amendment protection while expressive ones glide to the penthouse." *Pacific-Union Club v. Superior Court (State Franchise Tax Board),* 232 Cal.App.3d 60, 77 (1991). If New Jersey and other states have decided, as they are entitled to do, not to remain neutral in the regulation and rationing of economic opportunities to certain preferred categories in the market place, the First Amendment requires that neutrality in homes, private clubs, and Scout troops.

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[5] At least two of those Justices would simply jettison the result oriented construction of past private association decisions and the majority opinion in the Boy Scouts case because those "decisions have almost universally failed to formulate a coherent and comprehensive interpretation of 'business establishment.'" *Id.* at 733 (Brown, J., concurring), 722 (Mosk, J., concurring). *See also, id.* at 732-733 (Werdegar, J., concurring.)

Where the goal is diversity among free people, there can be no question that it is best achieved by autonomous activity by many persons pursuing their own individual interests and ideals without inhibiting government direction, regulation and oversight.

> History and our own observations tell us that in a free society, people associate for the sake of achieving an indefinitely large range of ends. Association is essential to their lives. . . . In pursuing their ends, and needing to associate to do so, people discover numerous sources of pleasure. . . . They discover numerous opportunities for many diverse kinds of experience. Associations of every form provide accommodations for experience, much of it pleasurable.

Kateb, *The Value of Association, in Freedom of Association, supra,* at 37.

A government need not encourage associations whose viewpoint it does not approve, but it cannot constitutionally interfere with the viewpoint of individuals or, we submit, private associations. *Cf. National Endowment for the Arts v. Finley,* 524 U.S. 569, 587-588 (1998) and Souter, J., dissenting at 603 note 2. Many associations through control of their membership criteria or their name alone reflect a viewpoint or an identity which would be changed or destroyed by government access dictates. Hadassah would lose its identity and purpose if forced to admit Buddhist men; the Loyal Orange Institution of the United States of America would suffer a similar fate if compelled to accept a Knight of Columbus; and the Italian Catholic Federation would be significantly transformed if it had to accept Eastern Jews. *See Curran, supra,* 17 Cal. 4th at 729 (Kennard, J. concurring). For the same reasons, private associations and social clubs are constitutionally entitled to preserve their own identity and objectives. A message may be offensive, *Nat. Socialist Party v. Village of Skokie,* 432 U.S. 43 (1977), or

loud and noisy, *Edward v. South Carolina,* 372 U.S. 229, 241 (1963), subtle or not (*cf. National Endowment for Arts v. Finley, supra,* 524 U.S. at 581-585, 590-591, 603-604), or even the result of silence. *Hurley v. Irish-American Gay Group, supra,* 515 U.S. at 574. The decision to include or exclude a message from a communication, like a decision to include or exclude an individual from an association — when no public place or public benefit is present — cannot constitutionally justify "mandated access." *Id.* at 580-581. Regardless of the after-the-fact analysis by the New Jersey Supreme Court about the clarity of the Boy Scouts' historically announced message of its membership criteria, (17a-18a, 36a-39a, 52a-56a), the Scouts cannot be constitutionally compelled to accept as members and leaders those individuals it does not want.

CONCLUSION

For the foregoing reasons, the judgment below must be reversed and this Court should rule that the New Jersey law may not be constitutionally applied to non-commercial private clubs and associations whether expressive or not.

Respectfully submitted,

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